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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON,
BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON, SNOHOMISH COUNTY,
AND PUGET SOUND KEEPER
ALLIANCE,

Appellants,

And

ASSOCIATION OF WASHINGTON
BUSINESS,

Intervenor,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-157
PCHB NO. 05-158
PCHB NO. 05-159

ORDER ON PARTIAL SUMMARY
JUDGMENT

On May 1, 2006, Appellants Associated General Contractors of Washington and Building Industry Association of Washington (AGC/BIAW) filed a Motion for Partial Summary Judgment through their attorney, James A. Tupper. On May 30, 2006, Appellant Puget Soundkeeper Alliance (PSA) filed its First Motion for Partial Summary Judgment and Response to AGC/BIAW's motion through its attorney, Richard A. Smith. On June 6, 2006, Respondent

ORDER ON SUMMARY JUDGMENT
PCHB NO. 05-157, 158, and 159

(1)

1 Department of Ecology (Ecology) filed a Response to AGC/BIAW's Motion for Partial
2 Summary Judgment through Joan M. Marchioro,¹ Assistant Attorney General, Senior Counsel.
3 On June 13, 2006, Ecology filed its Response to PSA's First Motion for Partial Summary
4 Judgment. On the same day, AGC/BIAW filed its Reply in support of Motion for Partial
5 Summary Judgment and its Response in Opposition to PSA's First Motion for Partial Summary
6 Judgment. On the same day, PSA also filed its Second Motion for Partial Summary Judgment.
7 On June 20, 2006, Appellant Snohomish County filed its Response to PSA's First Motion for
8 Partial Summary Judgment through its attorney, Thomas M. Fitzpatrick. On June 22, 2006,
9 AGC/BIAW filed its Response in Opposition to PSA's Second Motion for Partial Summary
10 Judgment and Cross-Motion for Partial Summary Judgment. On June 23, 2006, Snohomish
11 County filed its Response to PSA's Second Motion for Summary Judgment and Joinder in
12 AGC/BIAW's Cross-Motion for Partial Summary Judgment. On June 23, 2006, PSA filed its
13 Reply Supporting its First Motion for Summary Judgment. On June 26, 2006, Ecology filed its
14 Response in Opposition to PSA's Second Motion for Partial Summary Judgment through Ronald
15 L. Lavigne, Assistant Attorney General. On July 6, 2006, PSA filed its Reply Supporting its
16 Second Motion for Summary Judgment and Response to AGC/BIAW's Cross-Motion for Partial
17 Summary Judgment. On July 24, 2006, the parties appeared through their above-named counsel
18 and presented oral argument on the motions.

21 ¹ Ms. Marchioro was assisting Ronald L. Lavigne, the assigned Assistant Attorney General.

1 The Board hearing this matter was comprised of William H. Lynch, Chair, Kathleen D.
2 Mix, and Andrea McNamara Doyle. Administrative Appeals Judge, Kay M. Brown presided for
3 the Board.

4
5 The following documents were received and considered in ruling on this motion:

- 6 1. AGC/BIAW's Motion for Partial Summary Judgment and Declaration of James
7 A. Tupper, Jr. with attached Exhibit 1;
- 8 2. PSA's First Motion for Partial Summary Judgment and Response to
9 AGC/BIAW's Motion for Partial Summary Judgment; Declaration of Richard A.
10 Smith with attached Exhibits A-F; Deposition of Jeff Killelea; Declaration of
11 Amy Bates; Declaration of Lee Moyer; and Declaration of William Lider, P.E.;
- 12 3. Ecology's Response to AGC/BIAW's Motion for Partial Summary Judgment;
- 13 4. Ecology's Response to PSA's First Motion for Partial Summary Judgment and
14 Declaration of Jeff Killelea;
- 15 5. AGC/BIAW's Reply in Support of Motion for Partial Summary Judgment and
16 Response in Opposition to PSA's First Motion for Partial Summary Judgment;
- 17 6. PSA's Second Motion for Partial Summary Judgment; Deposition of Jeff Killelea
18 and attached Exs. 1 and 2;
- 19 7. Response of Snohomish County to PSA's First Motion for Partial Summary
20 Judgment and Deposition of Jeff Killelea;
- 21 8. AGC/BIAW's Response in Opposition to PSA's Second Motion for Partial
Summary Judgment and Cross-Motion for Partial Summary Judgment;
9. Declaration of John C. Ruple with attached Exs. 1-4;
10. Snohomish County's Response to PSA's Second Motion for Summary Judgment
on Joinder in AGC/BIAW's Cross-Motion for Partial Summary Judgment and
Declaration of Thomas M. Fitzpatrick with attached excerpts from Deposition of
Jeff Killelea;
11. PSA's Reply Supporting its First Motion for Summary Judgment, Declaration of
Richard A. Smith with attached Exs. G-J;
12. Respondent Ecology's Response in Opposition to PSA's Second Motion for
Partial Summary Judgment; and,
13. PSA's Reply Supporting its Second Motion for Summary Judgment and Response
to AGC and BIAW's Cross-Motion for Partial Summary Judgment with attached
excerpts from Deposition of Jeff Killelea.

1 Based on the record and evidence before the Board on the motions for partial summary
2 judgment, the Board enters the following decision.

3 Procedural Background

4 Ecology issued the Construction Stormwater General Permit for Discharges Associated
5 with Construction (Permit) on November 16, 2005. AGC and BIAW filed an appeal of the
6 Permit on December 15, 2005. The County and PSA filed appeals of the same permit on
7 December 16, 2005. The appeals were consolidated, and the Association of Washington
8 Business (AWB) was allowed to intervene. A pre-hearing order was issued that established 36
9 legal issues in the consolidated appeals. Four of these issues, plus the general issue of PSA's
10 standing, are the subject of these cross motions for partial summary judgment.² The issues are:

- 11 2. Is Condition S2A.1. unreasonable or unlawful in failing to require submission of an
12 applicant's stormwater pollution prevention plan (SWPPP) with its application for
13 permit coverage?
14 3. Is Condition S2.A.1. unreasonable or unlawful in its timeline for permit applications
15 and provision of permit coverage?
16 5. Is Condition S2.C. unreasonable or unlawful in its provisions for erosivity waivers for
17 permit coverage?
18 35. Does the permit fail to require implementation of AKART?

19 Facts

20 The Permit challenged in this case is both a National Pollutant Discharge Elimination
21 System (NPDES) permit, as required by the Federal Clean Water Act (CWA), 33 U.S.C.
§§1251-1376, and a State Waste Discharge General Permit issued pursuant to the Washington

² Three issues were also withdrawn during the course of the briefing on these motions. Those issues are Issue no. 4, 22, and 36.

1 State Water Pollution Control Act, Chapter 90.48 RCW. The Permit is a “general permit,”
2 which provides an alternative to individual NPDES discharge permits. General permits allow
3 regulators to efficiently administer a permit process covering large numbers of similar activities.
4 The purpose of this Permit is to control pollutants in stormwater and other discharges from many
5 of the construction sites across Washington. RCW 90.48.555, *Tupper Dec., Ex. 1*.

6 Coverage under the Permit may authorize stormwater and non-stormwater discharges
7 associated with construction activity. Construction activity refers to clearing, grading,
8 excavation, and other land disturbing activities which result in the disturbance of one or more
9 acres, as well as the disturbance of less than one acre of total land area that is part of a larger
10 common plan of development or sale, if the larger common plan will ultimately disturb one acre
11 or more. *Tupper Dec., Ex. 1. Sl.B.I., p. 4*. Companies planning to engage in activities
12 regulated by the Permit indicate their intentions to discharge under the Permit by filing a Notice
13 of Intent (NOI). Ecology has the right to deny coverage after receipt of the NOI, but in the
14 absence of denial, coverage is extended based upon the NOI. WAC 173-226-200, *Tupper Dec.,*
15 *Ex. 1*.

16 Condition S2.A.1.b. of the Permit addresses the requirement for at least 60 days’
17 advanced notice to the public of an applicant’s proposed activities and the timing of coverage
18 under the Permit.

19 Condition S2.C. of the Permit addresses another aspect of the Permit called an “erosivity
20 waiver.” Operators who would otherwise need to apply for coverage under the Permit may
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1 qualify for a waiver from the Permit if their site will result in the disturbance of less than 5 acres;
2 and they meet the other requirements for an erosivity waiver. These requirements, which mirror
3 the requirements found in EPA regulations implementing Section 402(p) of the CWA, are
4 intended to exempt construction sites “where negligible rainfall/runoff-erosivity is expected.”
5 See 33 U.S.C. § 1342(4)(B), 64 Fed. Reg. 68775 (Dec. 8, 1999). To qualify for an erosivity
6 waiver under the Permit, the project’s rainfall erosivity factor must be less than 5 during the
7 period of construction activity, and the entire period of construction activity must fall within
8 certain time frames set out in the Permit. *Tupper Dec., Ex. 1, Condition S2.C., p. 8.*

9 A key requirement of the Permit is that permittees must prepare and implement a
10 Stormwater Pollution Prevention Plan (SWPPP). The SWPPP is the primary method for
11 ensuring that the Permittee shall apply all known, available, and reasonable methods of
12 prevention, control, and treatment (AKART). *Tupper Dec., Ex. 1, S3.B.* SWPPPs must be
13 prepared and implemented prior to any discharges. *Tupper Dec., Ex. 1, S3.B., p. 9.* They are not
14 submitted to Ecology for approval or review, but are required to be available on site. A copy of
15 the SWPPP must be provided to Ecology within 14 days of receipt of a written request from
16 Ecology. The public can obtain access to a SWPPP through a request to the Permittee. *Tupper*
17 *Dec., Ex. 1, S5.G.2.*

18 The SWPPP must identify best management practices (BMPs) to minimize erosion and
19 sediment from rainfall runoff at construction sites and to identify, reduce, eliminate, or prevent
20 the pollution of stormwater. *Tupper Dec., Ex. 1, S3.B., p. 9.* BMPs may be selected from
21 Ecology’s most recent Stormwater Management Manual or other stormwater guidance

documents or manuals which provide an equivalent level of pollution prevention and are approved by Ecology. *Tupper Dec., Ex. 1, S.9.C., p. 22.* Alternatively, permittees are allowed to choose other “demonstrably equivalent” BMPs if they include:

Documentation in the SWPPP that the BMPs selected provides an equivalent level of pollution prevention, compared to the applicable Stormwater Management Manuals, including:

- a. The technical basis for the selection of all stormwater BMPs (scientific, technical studies, and/or modeling) which support the performance claims for the BMPs being selected; and
- b. An assessment of how the selected BMP will satisfy AKART requirements and the applicable federal technology-based treatment requirements under 40 CFR part 125.3.

Tupper Dec., Ex. 1, S9.C.4., p. 22, 23.

PSA challenges many aspects of the Permit, only a few of which are at issue in this motion for summary judgment. PSA is an organization whose mission is to protect and preserve the water quality in and around Puget Sound by identifying and stopping the discharge of toxic pollutants into its water. Its members use and enjoy the ecosystems affected by stormwater discharges. Their recreational and aesthetic interests include canoeing, kayaking, sea kayaking, walking, bicycling, wildlife photography, hiking, and birdwatching. These activities take place on or in close proximity to waters that receive stormwater discharges from general permit-covered construction areas. *Bates Dec., Lider Dec., Moyer Dec.*

1 Analysis

2 1. Summary Judgment

3 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
4 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
5 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 107, 108, 569 P.2d 1152 (1977). The
6 summary judgment procedure is designed to eliminate trial if only questions of law remain for
7 resolution. Summary judgment is appropriate when the only controversy involves the meaning
8 of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l*
9 *Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), *rev. denied*, 117 Wn.2d
10 1004 (1991).

11 The party moving for summary judgment must show there are no genuine issues of
12 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
13 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
14 summary judgment proceeding is one that will affect the outcome under the governing law.
15 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
16 and reasonable inferences must be construed in favor of the nonmoving party as they have been
17 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

18 Here, none of the parties argue that there are contested issues of material fact related to
19 these narrowly targeted cross motions for partial summary judgment. The Board agrees in part,
20 and concludes that summary judgment is appropriate on Issues 2, 3, and 5. Issue 35, however,
21 raises factual issues that must be decided at hearing.

1 2. Standing

2 AGC/BIAW challenges PSA's standing to bring this appeal. They contend that PSA
3 lacks standing because many of PSA's arguments are based on potential future violations of the
4 terms of the Permit.

5 In response, PSA argues first, that there is no requirement that an appellant show standing
6 or injury in fact to appeal a NPDES general permit, and second, that if there is a requirement,
7 PSA meets the requirement.

8 PSA's first argument is based on the absence of a statutory requirement that an appellant
9 show standing to appeal an NPDES permit. PSA made this same argument in the recent
10 Boatyard General Permit case, but the Board declined to address it. *See Puget Soundkeeper*
11 *Alliance and Northwest Marine Trade Association v. Ecology*, PCHB Nos. 05-150, 05-151, 06-
12 034, & 06-040, Order Granting and Denying Partial Summary Judgment (July 7, 2006). In light
13 of the repeat nature of this argument, and PSA's specific request that it be addressed, the Board
14 now takes up the argument.

15 PSA is correct in stating that there is no express statutory standing requirement for an
16 appeal filed under RCW 43.21B.110(1)(c). PSA is incorrect, however, in concluding that there
17 is no requirement that an appellant before the PCHB must have standing. Parties challenging an
18 administrative action must possess standing, just as any litigant must. *Bankhead v. Tacoma*, 23
19 Wn. App. 631, 635, 597 P.2d 920 (1979).

1 RCW43.21B.110(1)(c) states that the issuance of any permit by Ecology may be
2 appealed,³ and grants the Board jurisdiction to hear that appeal. RCW 43.21B.230 then sets out
3 the time period within which such an appeal must be filed. Neither RCW 43.32B.110 nor RCW
4 43.21B.230 addresses who may file such an appeal, and neither provision grants the right of
5 appeal to a person without standing. As the Washington Court stated in *Den Beste v. PCHB*, 81
6 Wn. App. 330, 339, 914 P.2d 144(1996):

7 The statute [RCW 43.21B.230] is limited in its scope to establishing the timeliness of an
8 appeal. Thus a person who requests and receives notice of a Department decision, but
9 who is not an interested party aggrieved by that decision, is not conferred standing to
10 challenge the decision simply because the Department has mailed a notice.

11 The Court in *Den Beste* acknowledges that a party to a PCHB appeal must have standing to file
12 an appeal.

13 The Board, in past decisions, has held that standing is a jurisdictional issue and that it
14 cannot hear an appeal “unless the parties before it have standing to pursue their claims.” *Center*
15 *for Environmental Law & Policy v. Ecology et. al.*, Order on Department of Natural Resources’
16 Motion to Dismiss, PCHB No. 96-165(1997) *citing Core v. Olympia*, 33 Wn. App. 667, 683, 684
17 (1983). The Board concludes that PSA must establish standing to be entitled to pursue an appeal
18 of the general construction permit.

19 In order to establish standing to bring an appeal, the Shorelines Board has previously held
20 that a petitioner (the SMA uses the term petitioner rather than appellant) must demonstrate: (1)
21 that the governmental action at issue causes a specific and perceptible injury-in-fact that is

³ An exception is created for water rights appeals that are subject to an ongoing adjudication, and were commenced

1 immediate, concrete, and specific; and (2) the interest the petitioner seeks to protect falls within
2 the zone of interest that the environmental statute is designed to protect. *Advocates for*
3 *Responsible Development v. Johannessen*, SHB No. 05-014 (Nov. 22, 2005). An appellant bears
4 the burden of proof on the issue of standing. *Center for Environmental Law & Policy* at CL IV.
5 An organization that shows that one (or more) of its members is specifically injured by a
6 government action may represent those members in proceedings for judicial review. *Save a*
7 *Valuable Environment v. Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978).

8 The “zone of interest” prong of the standing test requires that a party’s asserted interests
9 are among those the agency was required to consider when it engaged in the challenged action.
10 This prong focuses on whether the Legislature intended the agency to protect the party’s interests
11 when taking the action at issue. *Wash. Indep. Tel. Association v. WUTC*, 110 Wn. App. 498,
12 511, 41 P.3d 1212 (2002), *St. Joseph Hospital v. Department of Health*, 125 Wn.2d 733, 739,
13 887 P.2d 891 (1995). *See generally*, William R. Andersen, *The 1988 Washington Administrative*
14 *Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 824-25 (1989).

15 Washington's water pollution control statutes were enacted to "maintain the highest
16 possible standards to insure the purity of all waters of the state consistent with public health and
17 public enjoyment." RCW 90.48.010. These public policy interests relate directly to the activities
18 and concerns of members of PSA and the purpose of the organization itself. PSA is an
19 organization whose stated purpose is the protection of water quality in and around Puget Sound.

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before October 13, 1997. *See* RCW 90.03.210(2).

1 Its members use and enjoy the ecosystems affected by stormwater discharges from facilities
2 covered by the Permit. PSA's members engage in various recreational and aesthetic activities on
3 and around the receiving waters where the permitted facilities discharge stormwater. *Bates*
4 *Declaration, Lider Declaration, Moyer Declaration*. AGC/BIAW does not dispute these facts.
5 The Board has previously recognized that most environmental organizations are organized for
6 the purpose of protecting environmental interests, and therefore easily meet this prong of the
7 standing test. *Hale et al. v. Island County et al.*, Decision on Motion to Dismiss for Lack of
8 Standing, SHB Nos. 04-022 and 04-023 (January 27, 2005). The Board concludes that the
9 interests of PSA and its members are consistent with the interests that the Legislature intended
10 Ecology to protect when developing the Permit. Therefore, PSA satisfies the “zone of interest”
11 prong of the test for standing.⁴

12 AGC/BIAW focuses their challenge to PSA’s standing on the “injury-in-fact” prong of
13 the test, by arguing that the injuries alleged by PSA’s members are based on a fear that a
14 permittee may some day violate a permit or that Ecology may some day fail to properly enforce
15 the requirements of the permit. If an appellant’s arguments in a particular case are, in fact,
16 related only to future enforcement and not to the terms and conditions of a permit itself, then
17 those issues may be subject to dismissal on jurisdictional or other grounds. See *Ortman, et. al. v.*

19 ⁴ In two cases regarding standing by labor unions to contest an environmental decision, the Board has employed the
20 standing test contained in *International Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-
21 *v. Ecology and Cardinal FG Company*, PCHB No. 04-147, Order on Motion to Strike and Motion to Dismiss
Appeal for Lack of Standing (January 20, 2005); *Hale et al. v. Island County et al.*, Decision on Motion to Dismiss
for Lack of Standing, SHB Nos. 04-022 and 04-023 (January 27, 2005).

1 *Department of Ecology, et.al*, Order Granting Summary Judgment and Dismissal, PCHB No. 99-
2 115 and 116 (February 15, 2000)(holding PCHB lacks jurisdiction over enforcement issues).

3 But that is not the situation in this appeal by PSA. PSA's members assert that they use
4 waters that receive discharges from the permit-covered construction operations. PSA is alleging
5 that the deficiencies in the permit standards themselves (not lack of compliance or enforcement)
6 result in polluted discharges that harm the quality of the water that they use, and therefore harm
7 their interests. The Board concludes that this constitutes a specific, concrete, and perceptible
8 injury to PSA's members and organizational interests, and is sufficient to withstand
9 AGC/BIAW's challenge to the injury-in-fact prong of the standing test.

10 The Board finds, based on the factual material submitted by PSA in response to
11 AGC/BIAW's motion, that PSA meets both prongs of the test for standing. This conclusion is
12 consistent with the Board's recent ruling in *Puget Soundkeeper Alliance and Northwest Marine*
13 *Trade Association v. Ecology*, Order Granting and Denying Partial Summary Judgment, PCHB
14 Nos. 05-150, 151, 06-034 & 06-040 (July 7, 2006)(holding that PSA had standing to challenge
15 the Boatyard General Permit).

16 3. Timing of submission of the SWPPP (Issue 2)

17 PSA contends that Condition S2.A.1. is unreasonable or unlawful because it does not
18 require submission of a SWPPP at the time an applicant requests coverage under the Permit.
19 AGC/BIAW seeks dismissal of this issue on the grounds that there is no legal requirement for
20 Ecology to review a SWPPP prior to granting coverage under the general permit. AGC/BIAW's
21 position is consistent with the past decisions of the Board in which the Board has held that a

1 SWPPP does not need to be submitted at the time an applicant requests coverage under a general
2 permit. *See Puget Soundkeeper Alliance Waste Action Project, et.al., v. Ecology, et.al.*, Order on
3 Summary Judgment, PCHB No. 00-174 (August 29, 2001); *Save Lake Sammamish v. Depts. of*
4 *Ecology and Transportation*, Order Granting Partial Summary Judgment to Respondents, PCHB
5 No. 95-141 (June 27, 1996). See also *Puget Soundkeeper Alliance and Northwest Marine Trade*
6 *Association v. Ecology*, Order Granting and Denying Partial Summary Judgment, PCHB Nos.
7 05-150, 151, 06-034 & 06-040 (July 7, 2006).

8 PSA argues that the prior precedent of the Board should not be controlling on this issue
9 because (1) there have been developments in federal case law that require a different outcome,
10 and (2) there is a factual difference related to the SWPPP development process in the prior
11 general permits and this Permit.

12 The Board is not persuaded that there has been a change in the law such that the Board's
13 prior rulings should be reconsidered. The federal cases relied upon by PSA stand for the
14 proposition that allowing a permittee to derive permit requirements without oversight or agency
15 involvement constitutes a complete failure to regulate. *See Environmental Defense Center v.*
16 *Environmental Protection Agency*, 344 F. 3d 832 (9th Cir. 2003) *cert. den*, 541 U.S. 1085 (2004)
17 (rejecting the Phase II Permit which set no permit conditions and left the regulation of
18 stormwater up to the discretion of local governments covered under the permit); *Waterkeeper*
19 *Alliance, Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005) (rejecting EPA's method of regulation of
20 concentrated animal feeding operations (CAFOs) because operators could submit nutrient
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1 management plans indicating how they would manage animal waste, and the plans were not
2 subject to EPA review).

3 Here, in contrast, not requiring the SWPPPs to be submitted at the time of the application
4 for coverage does not constitute a failure to regulate. SWPPPs must comply with the terms of
5 the Permit. The Permit requires that BMPs must be consistent with prior approved stormwater
6 management manuals or documents, unless the applicant chooses to use BMPs that provide
7 equivalent levels of pollution prevention to those contained in the pre-approved manuals, and can
8 demonstrate the selected BMPs are equivalent to the prior approved BMPs. SWPPP adequacy
9 and effectiveness is evaluated via weekly site inspections. Whenever there is a discharge of
10 stormwater, the permit requires weekly turbidity sampling and weekly pH sampling. *Tupper*
11 *Dec. Ex. 1, S4*. The permittee must report sampling results to Ecology and undertake corrective
12 or adaptive management to protect water quality. This scheme provides substantially more
13 control and oversight than those reviewed in the *Environmental Defense Center* and *Waterkeeper*
14 cases. Ecology may also require an applicant seeking coverage under the Permit to submit a
15 SWPPP to Ecology for review prior to extending coverage under the Permit. *See Bloomquist v.*
16 *Ecology*, Order Granting Summary Judgment, PCHB No. 03-121(March 16, 2004).

17 PSA is correct, however, that there is a factual difference between this general permit and
18 the previous ones at issue in the prior Board decisions. In both the 1996 Lake Sammamish case
19 and the 2001 PSA case, the general permits at issue specifically required that SWPPPs include
20 BMPs drawn exclusively from specified Ecology guidance documents. *Save Lake Sammamish*,
21 Order Granting Partial Summary Judgment to Respondents, at II (“BMP’s [to be included in

1 SWPPPS] are to be selected from the Stormwater Management Manual for the Puget Sound
2 Basin.”); *Smith Dec. Supporting PSA’s First Motion for Summary Judgment, Ex. E (2000 CGSP)*
3 *at 13* (requirement for BMPs to be selected “from the most recent published edition of the
4 [Stormwater Management Manual for the Puget Sound Basin], or other equivalent manuals,
5 available at least 120 days before the selection of the BMPs is necessary”). In this Permit,
6 however, an applicant has the option of using a BMP that is not drawn from specified documents
7 that have been pre-approved by Ecology. To use this option, the applicant must document the
8 “equivalence” of the selected BMPs with approved BMPs. *Tupper Dec., Ex. 1, Condition S9C.4.*

9 The Board agrees with PSA that if an applicant selects an equivalent BMP in a SWPPP,
10 and the SWPPP is not submitted with the application, Ecology will not have notice that an
11 equivalent BMP will be used. Therefore, the safeguard in the permit of requiring that the BMP’s
12 “equivalence” be documented in the SWPPP becomes a less-than-perfect-mechanism for
13 ensuring equivalency. The Board concludes that this problem can be remedied by adding a
14 condition to the Permit requiring an applicant to notify Ecology prior to implementing an
15 equivalent BMP.⁵

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19 ⁵ PSA also argues that WAC 173-240-110(1) requires the submission of the SWPPP at the time of the permit
20 application. The Board held, in the recent Boatyard General Permit case, that this rule applied to the construction of
21 industrial waste water facilities, and therefore was not applicable to SWPPPs in that case. *Northwest Marine Trade Association v. Ecology*, Order Granting and Denying Partial Summary Judgment, PCHB Nos. 05-150, 151, 06-034 & 06-040 (July 7, 2006). Applying the same reasoning, the Board here concludes WAC 173-240-110(1) is inapplicable to this Permit.

1 With the modification identified above, the Board concludes that Condition S2.A.1. is not
2 unreasonable or unlawful because it does not require submission of a SWPPP at the time an
3 applicant requests coverage under the general permit.

4 4. Timeline for permit application (Issue 3)

5 Special condition S2.A.1.b. states:

6 The NOI shall be submitted on or before the date of the first public notice. . . and at least
7 60 days prior to the discharge of stormwater from construction activities. The 30-day
8 public comment period required by WAC 173-226-130(5) begins on the publication date
9 of the second public notice. Unless Ecology responds to the complete application in
10 writing, based on public comments, or any other relevant factors, coverage under the
11 general permit will automatically commence on the thirty-first day following receipt by
12 Ecology of a completed NOI, or the issuance date of this permit, whichever is later;
13 unless a later date is specified by Ecology in writing.

14 PSA contends that this provision violates the requirements of RCW 90.48.170, which
15 states in relevant part:

16 Application for permits shall be made at least sixty days prior to commencement of any
17 proposed discharge or permit expiration date, whichever is applicable.

18 PSA's argument is that the language of the permit does not affirmatively prohibit
19 discharges until the sixty-first day after NOI submission, and it does not prohibit the start of
20 pollution-generating construction activities until the sixty-first day, and therefore it does not
21 implement the sixty-day requirement of RCW 90.48.170.

PSA points to the deposition of Jeff Killelea⁶ as support for its position. Mr. Killelea
stated that an applicant could receive permit coverage 38 days after submitting its NOI, and

⁶ Mr. Killea is Ecology's Rule 30(b)(6) designee. The deposition was taken on March 30, 2006. Attachment to
PSA's Second Motion for Partial Summary Judgment.

1 could begin construction activities on that day. He also stated that a discharge could occur from
2 a construction site between the date of coverage and the date that is 60 days after the submission
3 of the NOI. If such a discharge occurred, Mr. Killelea stated that Ecology “could consider that a
4 violation of the permit....” He explained that Ecology would look at a variety of factors,
5 including whether the discharge violated state water quality standards or was otherwise
6 inconsistent with the terms of the permit. PSA contends that construction activities should
7 therefore be prohibited until the 61st day after the NOI was submitted.

8 PSA’s argument is not persuasive regarding the commencement of construction
9 activities. The language of the permit should be given its ordinary meaning, and should be read
10 in a manner that harmonizes with and furthers the objectives of the statute it implements. *See*
11 *Brown v. City of Yakima*, 116 Wn. 2d 556, 563, 807 P.2d 353 (1991)(Holding that a regulation
12 must be interpreted to harmonize with and further the objectives of the statute it implements.)
13 Permit condition S9. requires a SWPPP to be prepared and implemented in accordance with the
14 permit requirements beginning with initial soil disturbance. Here, a plain reading of permit
15 conditions S2.A.1.a. and S9. leads to the conclusion that construction activities under the permit
16 must be timed so that appropriate BMPs related to the activities are in place prior to
17 commencement of the activities. This is not inconsistent with RCW 90.48.170, which prohibits
18 discharges for 60 days after application, but does not address the timing for granting of coverage
19 or the start of construction activities.

20 PSA’s argument that discharges may occur prior to the expiration of the 60-day period is
21

1 more troublesome given the testimony by Mr. Killelea. The Board, nevertheless, looks to the
2 plain language of condition S2.A.1.b., which requires submission of the NOI “at least 60 days
3 prior to the discharge of stormwater from construction activities.” The Permit does not authorize
4 any discharge prior to the expiration of the 60-day period, and is therefore not inconsistent with
5 RCW 90.48.170.

6 5. Erosivity waivers

7 This issue raises a challenge to Condition S2.C., the so-called “erosivity waiver.”
8 Condition S2.C. exempts discharges of stormwater associated with construction activity that
9 disturbs up to five acres from permit coverage if certain conditions are met. PSA argues that this
10 provision violates RCW 90.48.160 which requires:

11 Any person who conducts a commercial or industrial operation of any type which results
12 in the disposal of solid or liquid waste material into the waters of the state, including
13 commercial or industrial operators discharging solid or liquid waste material into
14 sewerage systems operated by municipalities or public entities which discharge into
15 public waters of the state, shall procure a permit from either the department or the
16 thermal power plant site evaluation council as provided in RCW 90.48.262(2) before
17 disposing of such waste material:

18 PSA argues that this statutory provision does not authorize the exemption created by Condition
19 S2.C.

20 The source of the erosivity waiver comes from federal law. Section 402(p) of the Clean
21 Water Act (CWA) applies to industrial stormwater discharges as defined by EPA regulations.
This section of the CWA directs EPA to establish regulations implementing stormwater permit
requirements. 33 U.S.C. §1342(4)(B). The EPA rules promulgated pursuant to this section

1 exclude small construction sites that meet certain conditions from the definition of industrial
2 stormwater. 40 C.F.R. §122.26(b)(15)(i).

3 PSA agrees that this exemption exists in federal law, but argues that the Permit at issue
4 here is a State Waste Discharge Permit as well as a federal National Pollutant Discharge
5 Elimination System (NPDES) permit. PSA argues that the state law is broader than the federal
6 law, and therefore, the erosivity waiver violates state law. Ecology agrees that state law is
7 broader than federal law, but argues that the State Legislature did not intend to bring all
8 dischargers who would be subject to the state permitting program into the federal NPDES
9 program under the CWA. The general permit itself covers only certain types of defined
10 construction sites, not every construction site.

11 A construction site may be exempt from the requirements of an NPDES permit, but this
12 does not mean it is authorized to discharge under state law. Construction sites that discharge into
13 state waters, even if they are exempt under the erosivity waiver process from obtaining an
14 NPDES permit, and are not covered under the state General Permit, may still be required to
15 obtain a state waste discharge permit. Based upon this proper understanding of the effect of the
16 erosivity waiver, the inclusion of the waiver in the Permit is not inconsistent with RCW
17 90.48.160.

18 6. Implementation of AKART (Issue 35)

19 PSA contends the Permit does not require implementation of all known, available, and
20 reasonable methods of prevention, control and treatment (AKART) of waters discharged from
21

1 construction sites. AGC/BIAW contends that it does. All parties agree that AKART is a legal
2 requirement. See RCW 90.48.520, 90.52.040.

3 There is no dispute that the permit states that AKART is required. Condition S3.B.
4 provides:

5 Prior to discharge of stormwater and non-stormwater to waters of the state, the Permittee
6 shall apply all known, available, and reasonable methods of prevention, control, and
treatment (AKART).

7
8 The Board agrees with PSA, however, that simply stating AKART is required is not
9 enough to meet the requirements of the law. The real issue is whether the requirements of the
10 permit are sufficient to ensure that AKART is followed. This is a factual issue which cannot be
11 decided on summary judgment. Therefore, summary judgment is denied on this issue to all
12 parties, and this issue will proceed to hearing.

13 Based on the foregoing analysis, the Board enters the following

14 ORDER

- 15 1. PSA has standing to bring its appeal.
- 16 2. Summary Judgment on Issue no. 2 is GRANTED in favor of AGC/BIAW and
17 Ecology.⁷ Permit Condition S2.A.1. shall be amended by adding a new
18 subsection (d) to read as follows:

19
20
21

⁷ Summary judgment may be granted to the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

1 If an applicant intends to use a BMP selected on the basis of Condition S9.C.4.
2 (“demonstrably equivalent” BMPs), the applicant shall notify Ecology of its
3 selection as part of its NOI, unless the selection is made after submission of the
4 NOI, in which case notice of the selection of an equivalent BMP shall be provided
5 no less than 60 days prior to intended use of the equivalent BMP.

6 3. Summary Judgment on Issues no. 3 and 5 is GRANTED in favor of AGC/BIAW
7 and Ecology.

8 4. Summary Judgment on Issue no. 35 is DENIED. This issue involves disputed
9 issues of material facts and shall proceed to hearing.

10 5. Issues no. 4, 22, and 36 have been withdrawn by PSA.

11 DONE this 26th day of October 2006.

12 POLLUTION CONTROL HEARINGS BOARD

13 William H. Lynch, Chair

14 Kathleen D. Mix, Member

15 Andrea McNamara Doyle, Member

16 Kay M. Brown, Presiding
17 Administrative Appeals Judge